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THE LIMITATIONS OF THE ACTION OF ASSUMPSIT AS AFFECTING THE RIGHT OF ACTION OF THE BENEFICIARY.

(Continued from Volume 52, page 779.)

[*Errata in first part of article:* Page 773, line 15, after the word A and before the word assigns read "A makes B his executor and dies, and B having assets."

Note 39, at bottom of page 778, read folio 8, placitum 18.]

In the December number of the AMERICAN LAW REGISTER the writer has presented a number of cases of debt and of account, in which a beneficiary not a party to the transaction was allowed to recover upon the obligation. In the present issue the writer proposes to conclude the discussion of the cases of debt, and also to discuss the cases of account, in respect to the right of action of the beneficiary.

In debt, if the *quid pro quo* was a chattel, the title to or the ownership of it was by the delivery absolutely vested in the debtor.

Where A loaned money to B and then brought debt for its recovery, the legal title to the money bailed was always in B, otherwise the very intention of the loan would be defeated—*i.e.*, if B could not transfer title to the money he could have no benefit from the loan.¹ Where A promised

¹ "The subject of a loan may be either a specific thing, as a horse or a given quantity of a thing which consists in number, weight, or measure, as money, sugar, or wine. In the former case it is of the essence of the transaction that the thing lent continue to belong to the lender: otherwise the transaction is not a loan.

"In the latter case, the thing lent may (and commonly does) cease to belong to the lender and become the property of the borrower, such a loan commonly being an absolute transfer of title in the thing lent from the lender to the borrower. The reason why such a transfer of title takes place is obvious. The object of borrowing is to have the use of the thing borrowed; but the use of things which consist in number, weight, or measure commonly consumes them; and this use, of course, the borrower cannot have unless he owns the things used. When such things are lent, therefore, it is presumed to be the intention of both parties, in the absence of evidence to the contrary, that the borrower shall acquire the title to them.

But why then call the transaction a loan? The answer is, that, in

B "that if he is willing to carry 20 quarts of wine of my Master Prisot to G, he shall have 40 shillings,"² no one in the time of Henry VI or to-day would contend that the title to any specific 40 shillings was ever in B. The situation is not different where A gives B 40 shillings to give to C. B is C's debtor, but C does not have the title to any specific 40 shillings. Of course, A can say to B, give C this bag of coins or these particular crowns, and then no title passes to B, for the title, so far as B is concerned, is always either in A or C, according to the nature of the transaction between them. B is then not a debtor but a bailee, and is bailee to C in an action of detinue.

Thus in 1339 detinue was brought for 20 pounds "in a bag sealed up, etc., etc." The defendant objected to the writ on the ground "that he demands money, which naturally sounds in an action of debt or account." The plaintiff replied, "We did not count of a loan which sounds in debt,

every particular except the transfer of title, it is a loan; that the title is transferred for the purpose of making the loan effective as such, and because it is immaterial to the lender whether he receives back the identical thing lent or something else just like it. Moreover, the difference between a loan of money, for example, and a loan of a specific article, is not commonly present to the minds of the parties; the lender of money thinks the money lent still belongs to him, and that the borrower has acquired only the right to use it temporarily; he is aware that the borrower is entitled to transfer to other persons the identical coins lent, and that he has the option of returning to him, the lender, either the identical coins borrowed or others like them; but he is not aware that these rights in the borrower are inconsistent with his retaining the title to the money lent. In other words, he supposes (and, in every view except the strict legal view, he is right in supposing) that he may own a given sum of money without owning any specified coins; and that the only substantial difference between money in his own coffer and money due to him is, that in the former case he has the possession, while in the latter he has not.

A debt, therefore, according to the popular conception of the term, is a sum of money belonging to one person (the creditor), but in the possession of another (the debtor). There is also much reason to believe that this popular conception of a debt was adopted by the early English law, at least for certain purposes. Thus, the action of debt (which was established for the sole and exclusive purpose of recovering debts of every description) was in the nature of an action *in rem*, and did not differ in substance from the action of detinue; the chief differences between them being that the latter was for the recovery of specified things belonging to the plaintiff, the former, of things not specified." Langdell's Summary of Contracts, Sections 99, 100.

² Year Book, 37 Hen. VI, pl. page 8; see *ante*, pages 775, 776.

nor of a receipt of money for profit, which would give an action of account, but of money delivered in keeping under seal, etc., which could not be changed." The defendant was required to answer over.³

But where money in an unsealed bag was delivered, "one penny cannot be known from another in a bag, we are of opinion that detinue does not lie and therefore reverse the judgment."⁴

"When the defendant receives money belonging to the plaintiff but receives it under such circumstances that he has a right to appropriate it to his own use, making himself a debtor to the plaintiff to the same amount, and the defendant exercises such right, the receipt of the money will create a debt."⁵

In the action of debt, the relation of the debtor to both the beneficiary and the *quid pro quo* is plainly distinguishable from the relation of the modern trustee to the *cestui que trust*, and to the "trust property." This distinction is demanded, because the tests which determine a modern trust are not those which determine a mediæval debt.

The practical consequence of confounding debts with trusts is to erroneously limit the right of action of the beneficiary at common law to only those cases which fulfil the requisites of a modern trust.

The modern trust, with its conception of a double title to the trust property,—i.e., of a distinct "equitable ownership" apart from the legal title,—was a conception which developed in the Court of Chancery many years after the right of the beneficiary in debt had been established at law. The *cestui que trust* in later times recovers, because as to certain specific property he has a title recognized by Chancery. The two conceptions of liability are radically distinct. The

³ Year Book, 12 and 13 Edw. III, 244; Ames, Cases on Trusts, vol. i, page 52.

⁴ *Banks v. Whetston*, 1 Dyer, 22 b, note 137: "The chattel might be delivered to the bailee to be delivered to a third person, in which case the third person was allowed to maintain detinue against the bailee." Ames: "Parol Contracts Prior to Assumpsit," vi Harvard Law Review, at page 258.

⁵ Langdell: "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review at page 245 (1889).

quid pro quo, if a chattel, becomes, as above stated, the absolute property of the debtor. His receipt of it gives rise to an obligation to pay the beneficiary; but no one ever supposes that the beneficiary's right to recover is based on any "equitable ownership" of the chattel, or of the sum of money recovered.

* * * * *

The right of action of the beneficiary in account must next be considered. Historically, this remedy of the beneficiary antedates his action of debt, doubtless because in account there was never required to be a "contract" between the plaintiff and the defendant.

"A receiver is one who receives money belonging to another for the sole purpose of keeping it safely and paying it over to its owner."⁶

In account, "here again the writ was modelled upon the proprietary writs. The defendant must 'justly and without delay render to the plaintiff' something, namely, an account for the time during which he was the plaintiff's bailiff and receiver of the plaintiff's money. Even in the modern theory of our law 'the obligation to render an account is not founded upon contract, but is created by law independently of contract.' The earliest instance of this action known to us dates from 1232; the writ seems to come upon the register late in Henry III's reign, and much of its efficacy in later times was due to the statutes of 1267 and 1285. These statutes sanctioned a procedure against accountants which was in that age a procedure of exceptional rigor. We gather that the accountants in question were for the most part 'bailiffs' in the somewhat narrow sense that this word commonly bore, manorial bailiffs. In Edward I's day the action was being used in a few other cases; it had been given by statute against the guardian in socage and we find it can be used among traders who have joined in a commercial adventure; the trade of the Italian bankers was being carried on by large 'societies' and Englishmen were beginning to learn a little about partnership. Throughout the fourteenth and fifteenth

⁶ Langdell: "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review, page 244 (1889).

centuries the action was frequent enough, as the Year Books and Abridgements show.”⁷

It was never necessary, in order to constitute a man your receiver and therefore to render him accountable to you, that he should have received the money from you.

“If money be delivered by A to B in order that it may be delivered by B to C, or if it be delivered by A to B to the use of C, it has often been held that B will be accountable to C.”⁸

It was firmly settled that it was not necessary for the receiver to have actually received the money from the plaintiff. If, in the course of his dealing with another person, the defendant became the receiver of money due the plaintiff, though the plaintiff was not privy to the obligation or even aware of it, he could enforce it.

In a case of account by a legatee against executors the objection was made: “How can the daughter who never bails the money to the executors have account?” To which Lord Brooke answered: “I command you to receive my rents and deliver them to Lord Dyer, he shall have account against you: yet he did not bail the money.”⁹

“If a man deliver money to you to pay to me, I shall have account against you, although he may be but a messenger.”¹⁰

“A man shall have a writ of account against one as bailiff or receiver where he was not his bailiff or receiver; for if a man receive money for my use, I shall have an account against him as receiver; or if a man do deliver money unto another to deliver over unto me, I shall have an account against him as my receiver.”¹¹

No one could be your receiver unless he had received money. The receipt of chattels when the obligation was to sell them and convert them into money constituted the defendant not a receiver, but a bailee, who was also liable in account.¹²

⁷ Pollock and Maitland's History of English Law, vol. ii, page 219 (1895).

⁸ Langdell's "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review, page 249.

⁹ *Paschall v. Keterich*, Dyer, 152, note.

¹⁰ 1 Roll. Abr. Accompt (A), pl. 6.

¹¹ F. N. B. 116 Q.

¹² Langdell: "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review, page 244 (1889). See 46 E 3f3, pl. 6.

A distinction was made as early as 1367 between debt and account, when Cavendish said: "If I deliver certain money to you to *deliver* to John, he shall have a writ of account because the property is in him straightway upon your receipt by my hand; and he cannot have an action of debt." ¹³

In 18 Edward IV (1479) the *dicta* of two judges illustrate the controversy which was so long waged as to whether debt or account would lie in favor of a third person. *Catesby, J.*: "If I deliver 20 pounds to Catesby to deliver to Piggott, he can choose to have a writ of account against Catesby, or writ of debt." But *Brian, J.*, thought otherwise: "and to this that is said that I shall have an action of debt or account, I say that he shall have an action of account and not action of debt, for upon *what thing* shall his action of debt be founded? Upon a contract, not upon purchases, nor upon borrowing he cannot declare." ¹⁴

"If a man deliver money to you to pay to me," said the court in 6 Henry IV, "I shall have a writ of account against you and not a writ of debt because there is no contract between you." ¹⁵ "The obligation to render an account is not founded upon contract, but is created by law independently of contract." ¹⁶

In the earlier cases the argument is constantly advanced that the beneficiary's only remedy is account, but this contention is always met by the counter argument that he can sue either in account or debt. Thus in 1405 this colloquy occurs:

Hank.—"For if a man delivers certain monies to you to pay to me, I shall have a writ of account against you and not writ of debt, because there is no contract between you."

Tillesley.—"I think I can elect to have a writ of account or writ of debt."

Thirning.—"If a man takes rent from your tenants, shall you have a writ of debt?"

¹³ Year Book, 41 Edward III, folio 10, pl. 5. See *ante*, page 770.

¹⁴ Year Book, 18 Edward IV, folio 23, pl. 5.

¹⁵ Year Book, 6 Hen. IV, folio 7, pl. 33. See *ante*, page 771.

¹⁶ "A Brief Survey of Equity Jurisdiction," by C. C. Langdell, in ii Harvard Law Review, at page 243 (1889).

Tillesley.—"No, not there, but I shall have a writ of trespass. I suppose that if he takes it by your authority, you shall not have a writ of debt, *but a writ of account, because there is no contract between you.*"¹⁷

But by 1624 debt was allowed where money was given to the defendant to pay to the plaintiff. The old contention as to there being no "contract" between plaintiff and defendant created by the plaintiff's delivery of the money was ignored, and from this date it was acknowledged law "that *cesty que use* the delivery is made may have debt or account."¹⁸

This distinction between the cases where the beneficiary could bring account and where he could bring debt does not turn upon the question whether the defendant has acquired, and, therefore, can legally transfer, the title to the thing or money given him. The distinction turns on the question whether the defendant's receipt of a chattel or money constitutes a *quid pro quo*, *i.e.*, whether he may employ the chattels or money for the profit of himself (as his own property), or must employ it for the profit of another. The first alternative demanded an action of debt; the second, an action of account. As, in either alternative, we have seen that the beneficiary was given a remedy, the distinction loses its interest and importance. As shown by the last cited case, after 1624 the remedy of debt or account would lie even if the money was received only to pay a like sum to a third person.

Besides the distinction already made that the origin of debt was in contract while the origin of account was independent of contract, these actions must be compared and contrasted in other particulars.

Account, like debt, was clearly distinguishable from detainue. It was only in its most primitive form that account was conceived as *droitural*. The idea was that the defendant had possession of something belonging to the plaintiff, *viz.*,

¹⁷ Year Book, 6 Hen. IV, folio 7, pl. 33.

¹⁸ *Harris v. De Bervoir*, Croke, James, 687. See *ante*, page 773.

an account.¹⁹ In account, possession was a fiction just as in debt.²⁰ The plaintiff who sought to make a defendant in account his receiver was never regarded as having the title to any particular money. "If the property received consist of money, the defendant must not be bound to restore to the plaintiff the identical coin received by him; for, if he is, he will be a mere bailee—*e.g.*, if the money be sealed up in a bag. So he must not, as has been seen, have a right to appropriate the money received to his own use, for then he can be only a debtor. He must receive the money either to keep for the plaintiff, or to employ for the plaintiff's benefit; and yet his obligation must be capable of being discharged by returning to the plaintiff (not the identical money received, but) any money equal in amount to the sum received. For money cannot possibly be employed so as to yield a profit or income without losing its identity; and though it may be so kept as to preserve its identity, yet the duty of so keeping it will, as has been seen, make the keeper a mere bailee. Moreover, such a mode of keeping money is very unusual, and such a mode of keeping another person's money would presumptively be very improper, for the recognized mode of keeping money is to deposit it with a banker; and yet by so depositing it its identity is lost, for the moment it is deposited it becomes the property of the banker, the latter becoming indebted to the depositor in the same amount."²¹

"It will be seen, therefore, that in respect to the question under consideration, money differs from land or goods in at least three particulars: first, a receiver of money frequently becomes a debtor instead of a bailee, though the object for which he is made receiver is safe custody merely, as in the case of a banker; secondly, *a receiver of money, not being a banker, may be, and commonly is, accountable for the money received, though he receive it for safe custody merely, because, though not a debtor, yet he is not bound to preserve the identity of the money received*; thirdly, a receiver of

¹⁹ Pollock and Maitland's History of English Law, vol. ii, page 219.

²⁰ See *ante*, page 775.

²¹ Langdell, in ii Harvard Law Review, page 246.

money, if accountable at all, is always accountable for the *corpus*, since it is impossible that a receiver of money should be bound to return the identical money received, and yet be bound to account for profits made by employing the money.”²²

The distinction, then, between account and debt was not in respect to the title of the money recovered, for neither action was *droitural*; but the distinction was that in account the defendant had money which he was obliged to keep or employ for the plaintiff. A “receipt of money for profit,”²³ *ad merchandisandum*,²⁴ was often the gist of account. In debt there was no duty to do anything but merely to pay over the sum for which the defendant had become, in whatever way, obligated; “but if I bring an action of account I shall recover the increase and the profit of the same lent,”—*i.e.*, if the bailment was *ad merchandisandum*.²⁵

It has been said by Ames that “A plaintiff entitled to an account was strictly a *cestui que trust*,”²⁶ and further, that “trusts for the payment of money were enforced at common law long before Chancery gave effect to trusts of land. It need not surprise us, therefore, to find that upon the delivery of money by A to B to the use of C, or to be delivered to C, C might maintain an action of account against B.”²⁷

This language is an apt simile, but does not represent, and was doubtless not intended to represent, an exact equation.

Misapprehension will arise if the position of the bene-

²² Langdell: ii Harvard Law Review, at page 247.

²³ See Dyer, 125, *ante*, page 771, note 21.

²⁴ See *Harris v. Bervoir*, Cro. Jac. 687, *ante*, page 772.

²⁵ See Dyer, 125, *ante*, page 771; but see *Rolle Accompt*, O. 125, 12, 14.

²⁶ Ames: *Parol Contracts Prior to Assumpsit*; viii Harvard Law Review, 258 (1894).

²⁷ *Parol contracts prior to assumpsit*, viii Harvard Law Review, 258 (1894), citing the following authorities: *Fitz. Abr. Acct.* 108 (32 Ed. III); *Bellevue Acct.* 7 (2 Rich. II); *Y. B.*, 41 Ed. III, 10-5; 6 Hen. IV, 7-33; 1 Hen. V, 11-21; 36 Hen. VI, 9, 10-5; 18 Ed. IV, 23, 5; 1 Ed. V, 2, 2; *Robsert v. Andrews*, Cro. Eliz. 82; *Huntley v. Griffith*, Gold, 159; *Harrington v. Rothervam*, Hob. 36; *Brownl.* 26 S. C.; *Clark's Case*, Godb. 210, pl. 299; Ames's *Cases in Trusts* (2 ed.), 1, note 3; 4, note 1.

ficiary in account is understood as identical with that of the modern *cestui que trust* in equity.

If A transfers chattels or stock to B, directing B to apply the rent or income of the property to the payment of A's creditor, X, there arises, by the doctrine of trusts, a double title, one equitable in X, and the other legal in B, and the situation is called in equity a trust.

If A gives chattels to B in such a way that the chattels are the absolute property of B, and in consideration thereof B promises to pay A's creditor, X, there is no trust whatever.

While it is true that the action of account is based on the conception that something—*viz.*, an account—belonging to one man, the plaintiff, is in the possession of another man, the defendant, we have above shown that no specific money is supposed to be owned by the plaintiff. His right is only to receive an equivalent sum. In account, the defendant's "obligation must be capable of being discharged by returning to the plaintiff (not the identical money received, but) any money equal in amount to the sum received."²⁸ In the former of the two above stated cases, X has by the modern doctrine of trusts an equitable title with respect to the chattels. In the latter case, he has no equitable title, but he has the right to recover in the common law action of account.²⁹

The right of action of the beneficiary at common law in account was therefore different from that of a *cestui que trust*, because the former had a right of action notwithstanding the fact that the title to the property might be vested absolutely and solely in the defendant.

This distinction between a trust and an accountability to, or receivership in favor of, a third party is of much consequence because the second of the two above hypothetical cases (*i.e.*, where no modern trust exists) is a typical formula expressing the right of a third party to recover at common law in account.

²⁸ Langdell: ii Harvard Law Review, page 246.

²⁹ See *ante*, pages 770 to 774.

The cases cited by Ames have all been examined without disclosing anything inconsistent with this conclusion.

The first reported cases in Chancery where the heir or transferee of the title of *cestui que use* compels "the feoffee to uses" to convey³⁰ are of the reign of Edward IV,³¹ and are readily explained on the ground of a duty imposed by Chancery on the conscience of the feoffee to uses without resorting to any conception of "equitable ownership."

We find the right of the beneficiary in account recognized as early as 1368,³² where the transaction is described as a bailment and not yet as a transfer of property "*al oeps*." The first case the writer has found where the words "*al oeps*" are used in this connection was in 1458.

If we look to the then contemporaneous chancery doctrine of uses, we find nothing to indicate that a use in Chancery in the fourteenth and fifteenth centuries was more than a personal right of *cestui que use*, his heirs, devisee, or assignee, against the feoffee to uses.

The authorities collected by Ames establish beyond question that as late as 1450 the heir of the feoffee to uses held the land free from liability to the *cestui que use*.³³

A use might be enforced by the heir, etc., "but neither a wife, a husband, nor a judgment creditor was entitled to this privilege."³⁴ "If the feoffee to uses died without heir or committed a forfeiture or married, neither the lord who entered for the escheat or forfeiture nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom the dower was assigned, were liable to perform the trust, because they were not parties to the transaction, but came in by act of law, or in the *post*, and not in the *per*, as it was said, though doubtless their title in reason was no better than that of the heir against whom the remedy was extended. It was the same as regards any other person who

³⁰ *Archbishop of York v. Richard Osborn and Edward Gower*, Cal. 94; Spence's Equitable Jurisdiction, page 454.

³¹ Chancery Calendars.

³² Year Book 41 Edward III, folio 10, placitum 5. See *ante*, page 771.

³³ Ames's Cases on Trusts, vol. i, page 345, notes 1 and 2.

³⁴ Spence's Equitable Jurisdiction, page 446.

obtained possession, not claiming by any contract or agreement with the feoffee, between whom and the *cestui que use*, therefore, there was no privity. 'Where there was no trust, there could be no breach of trust.' The remedy against a disseisor, therefore, was not in Chancery at the instance of the *cestui que trust*, but at law at the instance of the feoffee; and it was part of his duty to pursue his legal remedies at the desire of the *cestui que trust*."³⁵

Uses of personality were doubtless enforced in Chancery at an early date,³⁶ but in debt and account there is not the slightest ground for believing that the recovery of a beneficiary was based on any ownership, equitable or otherwise, of any specific coins or chattels, or that the defendant in account could ever be restricted from transferring the title to both the money and the property "received." It has been previously shown that the same is true of the title to the *quid pro quo* in debt. The modern characteristic of equitable ownership—the right to compel the trustee to devote the *res* to the designated purposes—was precisely what courts of law in account never dreamed of attempting. If complete title had not been transferred to the receiver, the very purpose of the receipt *ad merchandisandum* would have been frustrated. A court of law was obviously without the machinery to enforce such an equitable title had it existed.

It is, of course, true that judges and counsel, in speaking of the plaintiff's right of recovery in account, refer to his "property" in the money sought to be recovered.³⁷

But this means no more than the similar popular conception that we have seen existed in regard to debt and which survives to-day in the popular expression "money in the bank."³⁸

³⁵ Spence's Equitable Jurisdiction, page 445, citing Year Book 11 Hen. VIII, 24: "The King or lord by escheat cannot be seised to an use or trust for they are in the *post* and are paramount to the confidence." Jenk. Ca. xcii.

³⁶ See Spence, page 456, note h (temp. Hen. VI).

³⁷ See *ante*, pages 770-771. Cases in Year Books.

³⁸ "The repayment of an equivalent sum of money is equated, with the bold crudity of archaic legal thought, to the restitution of specific land or goods. Our Germanic ancestors could not conceive credit under any other form. After all, one may doubt whether the majority of

It is true that the cases in account speak of the defendant's having received the money "*al oepe*" of the plaintiff.³⁹

But in reading cases of debt and account in the fifteenth, sixteenth, and seventeenth centuries we must not mistranslate "*oepe*"—use, still less should we translate "*oepe*"—trust. The word "*oepe*" is derived from the Latin *opus*, signifying benefit, and not from the word *uses*,⁴⁰ a term of definite legal meaning in the civil law.⁴¹

Thanks to Maitland's researches, we have direct evidence that for many years "*oepe*" was used merely to signify a benefit and without any settled technical signification, either of a later Chancery trust or of a civil law "*usus*."

His researches show that in 1238–9 Bracton records that "a woman, mother of H, desires a house belonging to R; H procures from R a grant of the house to H to the use (*ad opus*) of his mother for her life."⁴²

As late as the year 1339 occurs a case, not mentioned by Maitland, where the word "*oepe*" is used unmistakably in the sense of benefit and without any suggestion of a legal and equitable title. In Year Book XII and XIII Edward III, page 231 (1339), occurs the description of a feudal

fairly well-to-do people, even at this day, realize that what a man calls 'my money in the bank' is a mere personal obligation of the banker to him." "Pollock's Contracts in Early English Law," vi Harvard Law Review, page 399 (1892).

³⁹ See *ante*, pages 771 *et seq.* Cases in Year Books. See also Year Book 2 Hen. IV, pl. 50, folio 12.

⁴⁰ "The Origin of Uses," by F. W. Maitland, viii Harvard Law Review, page 127 (1894); Pollock and Maitland's History of English Law, vol. ii, pages 228–240.

⁴¹ "The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use trust or confidence.' In tracing its embryonic history we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived, not from the Latin word *usus*, but from the Latin word *opus*, which in Old French becomes *os* or *oes*. True that the two words are in course of time confused, so that, if by a Latin document land is to be conveyed to the use of John, the Scribe of the Charter will write *ad opus Johannis*, or *ad usum Johannis* indifferently, or will perhaps adopt the fuller formula, *ad opus et ad usum*, nevertheless the earliest history of 'the use' is the early history of the phrase *ad opus*."—Maitland: "The Origin of Uses," viii Harvard Law Review, page 127.

⁴² F. W. Maitland: "The Origin of Uses," viii Harvard Law Review, page 134.

conveyance, and in describing the transaction the language applied to the vendors is:

"Il vendront et rendront en la court le seigneur *al oepe* celui qe serra feffe et les baillifs front execution."

The note of the editor of this translation of the Year Books shows that the words "*ad oepe*," which he has translated "to the use," are in the record "*ad opus*."

"We hardly need say that the *use* of our English law is not derived from the Roman 'personal servitude;' the two have no feature in common. Nor can I believe that the Roman *fideicommissum* has anything to do with the evolution of the English *use*. In the first place, the English *use* in its earliest stage is seldom, if ever, the outcome of a last will, while the *fideicommissum* belongs essentially to the law of testaments. In the second place, if the English *use* were a *fideicommissum* it would be called so, and we should not see it gradually emerging out of such phrases as *ad opus* and *ad usum*. What we see is a vague idea, which developing in one direction becomes what we now know as agency, and developing in another direction becomes that *use* which the common law will not, but equity will, protect. Of course, again, our 'equitable ownership' when it has reached its full stature has enough in common with the prætorian *bonorum possessio* to make a comparison between the two instructive; but an attempt to derive the one from the other would be too wild for discussion."⁴³

The present discussion does not involve such recondite issues as whether or not, and if so, to what extent, Chancery was indebted to the civil law for the doctrine of uses.

The cases taken from the Year Books show that the word "*oepe*" is frequently used in describing the beneficiary.

The writer submits that there is not the slightest reason to believe that either in the Year Books or in Rolle the word "*oepe*" or "use," etc., was used in the technical meaning of a modern trust—i.e., to convey the idea of equitable ownership and a double title. What is here contended is that in the cases of debt and account in the Year Books the word "*oepe*" or "*opus*" is used in the then familiar and common

⁴³ F. W. Maitland: "The Origin of Uses," viii Harvard Law Review, page 137.

everyday meaning of benefit.⁴⁴ In debt or account it was enough if the chattel or money was received for the benefit of a third person. The beneficiary recovered in debt or in account, not because he was a "*fructuarius*" under the civil law, nor because he was a "*cestui que trust*," that later protégé of Chancery, but because the primary obligation known as a debt or a receivership had been created for the plaintiff's benefit by the defendant's receipt of money or property.

As account was not based on contract, the obligation of the defendant to account to the beneficiary presupposed no prior contractual relation of any kind between them. The phrase "stranger to the consideration," as applied to the plaintiff in account, would have been meaningless jargon to the lawyers of the fifteenth century. After four centuries the phrase has become no more applicable.

Nor was the plaintiff in account required to be the promisee. Privity to the defendant's obligation was a pure fiction. "If, however, he obtain possession in the plaintiff's behalf and as his representative, *though without any actual authority*, the plaintiff may adopt and ratify his acts, and thus establish privity between him and the plaintiff."⁴⁵

⁴⁴ Year Book 10 Hen. VI, 6, pl. 19: "A man brought writ of debt against an executor and recovered and had fieri facias to the sheriff of London, and levied the money of the goods of the deceased. And the sheriff returned that he had no goods of the deceased, but that they had goods long time before the writ and he delivered and had sold the goods and converted the sum to their own *oepts*."

Year Book 10 Hen. VI, 11, 38: "Bakington. The husband shall have good action in this case that you have put and it is not against reason that the husband shall be charged of this debt, for the freehold was in him as well as in the wife during the coverture, and all profits of the land he took to his own *oepts*."

Year Book 4 Ed. III, 50, pl. 45: "One A brought his writ of account against G, *de tempore quo fuit receptor denarr*, and counted that he received 20 pounds to trade, etc., and of this good and legal account rendered, and said if he would deny it he had good suit, and see here the deed which witnesses it; and it was read and said that G had received 20 pounds of the aforesaid A and P, his wife to profit to the *oepts* of the aforesaid A and P, and bound themselves to pay 20 pounds on a certain day to the aforesaid A and P."

Year Book 4 Ed. III, 31, pl. 38 (last of case): "*Thorpe*. Say whether she administered as executrix, or not, as this writ charges; for peradventure if she claims all to her own *oepts*, and does not make distribution for alms, then she did not administer as executrix."

⁴⁵ Langdell's "Brief Survey of Equity Jurisdiction," ii Harvard Law Review, pages 248, 249.

Debt and accountability were therefore primary common law obligations enforceable by the beneficiary, not because he was a "privy" to the contract, or a "promisee" or a "*cestui que trust*," or had furnished that "mystery" of the eighteenth and nineteenth centuries—"the consideration." We err in attempting to analyze into constituent elements a substantive right which is itself primary and elemental.

The beneficiary recovered because the judicial instinct recognized that he ought to recover, and the courts held that by common law he had a substantive right. This common law right was the expression of a public sense of justice, and a firmer foundation for a positive rule of law need not be sought.

"Justinian's Pandects only make precise
What simply sparkled in men's eyes before,
Twitched in their brow or quivered on their lip,
Waited the speech they called but would not come."

Crawford D. Hening.

(To be continued.)